Supreme Court, U. S.
FILED
DEC 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1572

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

TED R. GRAYSON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT TED R. GRAYSON

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ON WRIT OF CERTIORARI TO THE
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FOR THE THIRD CIRCUIT

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## QUESTION PRESENTED

Whether a trial judge, in determining an appropriate sentence for a convicted defendant, may take into account his belief that the defendant lied at trial.

## STATEMENT

For the most part, Respondent is satisfied with the factual background as set forth in Petitioner's Statement.

However, since the issue in this case centers around alleged perjury by Respondent during his trial, a more detailed rendition of the trial testimony is deemed necessary.

The parties stipulated that Respondent had been lawfully committed to the Allenwood Prison Camp on August 29, 1975 pursuant to a three-year sentence imposed by the United States District Court for the Eastern District of New York, and that on October 11, 1975, he left the Allenwood Prison Camp without permission (App. 8). Respondent left the Allenwood Prison Camp at approximately 9:30 P.M. on that date (App. 22). On October 13, 1975, at approximately 10:15 A.M., two agents of the Federal Bureau of Investigation took Respondent into custody at an apartment at 4 Park Avenue, New York City (App. 9, 10, 18), this being the same address which he had given as his home address upon commitment to Allenwood. (App. 22-23, 52). The FBI agents testified that upon taking him into custody, Respondent denied that he was Ted Grayson (App. 11, 19). Respondent testified that he did not deny his identity to the FBI agents, but he did refuse to tell them whether or not he was Ted Grayson (App. 31).[1]

At the conclusion of the Government's case in chief, Respondent took the stand and by his testimony raised the defense of duress. He testified that as a result of

[1] The recollection of the FBI agents concerning the facts surrounding Respondent's arrest was not particularly good. For example, Agent Petersen testified that Respondent was not handcuffed, and that Agent Bullard probably drove the car which took Respondent to headquarters (App. 17). Agent Bullard testified that he thought Agent Petersen drove the car and that Respondent was handcuffed (App. 21).



losses sustained in a poker game, he owed another inmate, Alex "Sarge" Barnes, 40 cartons of cigarettes. He began paying Barnes 3½ cartons of cigarettes per week since an inmate is permitted to purchase only 4 cartons of cigarettes per week from the camp commissary.[2] However, Barnes began to pressure Respondent for payment in cash, a valuable type of contraband at the prison camp. Barnes began applying the pressure on October 9, 1975 (App. 27, 35), and on October 11, 1975, at approximately 3:30 P.M., Barnes and several of his friends pushed Respondent against the wall and threw some punches at him (App. 27-28). Later in the evening on October 11, 1975, just prior to Respondent's leaving the prison camp, Barnes came into Respondent's dormitory carrying a board with a nail protruding through it and further threatened Respondent (App. 28-29).

Barnes, like Respondent a convicted felon, was called by the Government as a witness on rebuttal. He admitted his participation in card games with the Respondent, but claimed that the loser would pay by doing 25 pushups (App. 66) or perhaps a pack of cigarettes (App. 70). He denied that Respondent owed him anything as a result of the card games and denied ever confronting or

[2] Respondent testified that he incurred the debt to Barnes approximately three weeks (App. 35) before the October 11, 1975 escape, and that he thereafter made two payments to Barnes, the second of which depleted the balance in his commissary account (App. 25). Respondent's commissary account, Ex. D-1, indicated that he purchased from the commissary goods in the amount of $31.80 on September 30, 1975, and that he purchased goods in the amount of $8.39 on October 9, 1975. After this last purchase, the balance in his account was $.06 (App. 54-55).

threatening Respondent (App. 68-70). However, Respondent's version of the events was corroborated to some extent by another inmate who testified that on October 11, 1975, at approximately 3:00 P.M., he witnessed a portion of the confrontation between Respondent and Barnes. Although he saw no physical violence, he did hear Barnes or one of his several friends talking in a loud voice to Respondent (App. 61-64).

Shortly after being threatened by Barnes on the evening of October 11, 1975, Respondent left the Allenwood Prison Camp and hitchhiked to his residence in New York City. In order to avoid looking conspicuous, Respondent removed his jacket and shirt and left them outside of the fence surrounding the camp, but denied removing his prison issued trousers (App. 52). On rebuttal, the Government called a prison guard who testified that on the day following Respondent's escape, he searched the area outside of the fence and found "scattered" in the bushes various articles of clothing including Respondent's shirt, a prison issued jacket, and a pair of khaki work trousers which could not be identified as belonging to Respondent (App. 72-74). These items of clothing were found on Penny Hill (App. 75), an area well known as a drop-off point for contraband coming in and out of the Allenwood Prison Camp (App. 89). The khaki work pants which were found in this area were of the type worn by inmates on most of the work details at the prison camp. However, inmates working in the kitchen and hospital wore white work pants (App. 80-81). Respondent was assigned to the kitchen detail while at Allenwood (App. 89).

Respondent testified that although he had spoken with prison authorities about various problems, he never



told any officials about the pressure applied by Barnes because he was frightened, not thinking straight, and because he doubted the ability of the Allenwood officials to properly protect him (App. 30, 43). Respondent's caseworker admitted that an inmate complaining about being threatened is not transferred from Allenwood immediately, but rather, an investigation is undertaken (App. 95). Although Respondent testified that he began hitchhiking upon leaving the prison camp and was not attempting to avoid the state police (App. 50), he also testified that he removed his inmate clothing so that he would not be detected as an inmate, since his primary purpose was to get away from Allenwood (App. 51).

At the close of the evidence, the judge charged the jury. By the terms of the charge, the jury could have found the Respondent guilty despite believing all of his testimony. In charging the jury, the trial judge listed the four elements of the crime of escape under 18 U.S.C. Section 751(a), and then stated:

> "There is no dispute in this case with respect to the first three elements. The Defendant admits that he was lawfully confined and that he left the Allenwood Prison Camp without permission. However the last element of the offense of escape with intent to avoid confinement is in dispute.
>
> In order to sustain its burden of proof in this case, the Government must prove beyond a reasonable doubt that the Defendant voluntarily departed from custody with an intent to avoid confinement.
>
> The Defendant has introduced evidence suggesting that any illegal acts which he may have committed were the result of coercion or compulsion or duress. Now compulsion or coercion or duress may provide a legal excuse for the crime charged in

the indictment. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present and immediate and of such a nature as to induce a well-founded fear of impending death or serious bodily injury. *And there must be no reasonable opportunity to avoid compulsion without committing the crime.*

If the evidence in the case should leave you with a reasonable doubt whether at the time and place of the alleged offense the Defendant Grayson acted willfully and voluntarily—that is to say whether the accused was forced in effect to commit the crime charged in the indictment by coercion or compulsion as just explained—then you should acquit the accused.

Whether the Defendant had a reasonable opportunity to avoid the coercion or compulsion or duress without leaving Allenwood Prison Camp depends upon whether he acted as an ordinary man would have acted under all the same circumstances; that is whether an ordinary man would have felt it necessary to leave the Allenwood Prison Camp when faced with the same degree of compulsion, coercion or duress as the Defendant was faced with in this case.

*If you find that the Defendant was compelled to leave the Allenwood Federal Prison Camp but that after he left, he voluntarily decided to remain at large, you may find the Defendant guilty of escape.*" (Emphasis added).

Transcript at pp. 223–225. The jury found Respondent guilty as charged.



## SUMMARY OF ARGUMENT

Historically, a sentencing judge has had wide discretion in sentencing a convicted defendant, both as to the length of the sentence and as to the sources and types of evidence used in determining the appropriate sentence. Recently, however, appellate courts have been less reluctant to review and set aside sentences where abuses of discretion are evident. A trial judge's consideration of a defendant's alleged perjury at trial is materially different from other legitimate sentencing considerations. Because of the actual and potential abuses caused by this practice, the Court should disapprove the consideration of alleged perjury by sentencing judges, either as a matter of constitutional law or in the exercise of the Court's supervisory power over the federal courts.

A. The commission of perjury by a defendant during his trial has no legitimate relationship to the recognized purposes of sentencing. The generally recognized purposes of sentencing include protection of society, punishment, deterrence, and rehabilitation.

If punishment, protection of society, or deterrence is the basis upon which a defendant's alleged perjury is considered in determining an appropriate sentence, then the defendant is in fact being sentenced for the crime of perjury. Because perjury is a substantive crime an individual charged with perjury is accorded the full constitutional guarantees accorded all other criminal defendants. Where a court makes a summary determination that a defendant committed perjury, and increases the sentence as punishment for the purpose of deterring other defendants from committing perjury, the defendant is denied due process of law. Recognizing this problem, courts

usually rationalize the consideration of perjury as a sentencing factor on the ground that perjury is a reflection of the character of the defendant and his prospects for rehabilitation, and therefore a legitimate consideration by the sentencing judge. However, this distinction is, at best, an obscure one.

Furthermore, it is doubtful that perjury by a defendant at his trial is in fact reflective of the defendant's need for rehabilitation. Because of the pressures which a criminal trial places upon a defendant, and because it is a natural inclination to attempt to avoid incarceration, a defendant is likely to testify falsely even though he is sincerely repentant and is otherwise a good candidate for rehabilitation. With the ascendance of the plea bargaining system, a defendant is more likely to admit his guilt for reasons of expediency and a desire to obtain sentencing concessions, rather than because of his principles against committing perjury. When a defendant avoids perjury out of expediency rather than principle, it is doubtful whether he is a better prospect for rehabilitation than the defendant who perjures himself in an unsuccessful effort to obtain acquittal.

B. Even assuming that perjury is relevant to a defendant's need for and prospects for rehabilitation, perjury as a sentencing factor is materially different from other factors relevant to the rehabilitation question. Unlike other legitimate sentencing factors such as prior criminal activity and general character traits, perjury is punishable in a separate criminal proceeding. Any additional incarceration which may be deemed necessary as a result of a defendant committing perjury should be given in the separate proceedings which provide the accused normal constitutional safeguards. Furthermore, perjury



is the only sentencing factor the existence of which the trial judge is called upon to determine. It has long been recognized that perjury is inherently difficult to establish and therefore, additional proof requirements such as the "two witness rule" has been made a part of perjury prosecutions. A summary determination of perjury by a trial judge ignores these recognized proof problems, and therefore, it is quite likely to be incorrect since it may be based upon the judge's impressions or suppositions gained in the emotional context of the criminal trial. Federal courts have always been concerned with the veracity of facts considered by a judge in sentencing.

C. The threat of an increased sentence based upon the trial judge's belief that the defendant committed perjury during his trial, unconstitutionally "chills" the exercise of the defendant's right to testify in his own behalf. In determining whether a particular practice "chills" constitutional or statutory rights, the legitimacy of and policy behind the particular practice must be weighed against the extent to which it actually impedes the exercise of the particular right involved. As previously pointed out, it is doubtful whether perjury has any relevance to legitimate sentencing considerations. Consideration of perjury as a sentencing factor is further rendered doubtful because of the alternative remedy available in cases of alleged perjury, and because it is often so difficult for the trial judge to make this determination. Because of the doubtful validity of the practice in the first place, it is not necessary to show a substantial "chilling" effect. Nevertheless, it is clear that sentence enhancement for alleged perjury is a common practice. Realizing that his sentence may be increased because of the judge's belief that he committed perjury,

an innocent defendant may very likely avoid this risk and negotiate a plea in order to receive a less severe sentence.

D. Whether or not the Court agrees with Respondent's contention that the practice here in issue is unconstitutional, it cannot be doubted that there are substantial problems in permitting a sentencing judge to consider his belief that the defendant gave false testimony. Therefore, if the Court is unwilling to brand this practice unconstitutional, it should at least exercise its supervisory powers over federal courts by prohibiting the practice in federal criminal trials or by imposing severe restrictions. At a minimum, a trial judge should not be permitted to consider alleged perjury as a sentencing factor unless the falsity of the defendant's testimony is necessarily established by the finding of guilt.

## ARGUMENT

### A TRIAL JUDGE, IN IMPOSING SENTENCE UPON A CONVICTED DEFENDANT, MAY NOT TAKE INTO ACCOUNT HIS BELIEF THAT THE DEFENDANT LIED AT TRIAL.

The issue presented in this case was brought sharply into focus when the trial judge, following his customary and commendable practice of listing reasons for sentences imposed upon convicted defendants, clearly stated that one of the two factors which he considered in determining an appropriate sentence for the Respondent was his belief that Respondent's defense "was a complete fabrication without the slightest merit whatsoever" (App.



107). It is Respondent's contention that the trial judge's belief was erroneous and unsupported, but even if supported, it was improper for the judge to consider this factor when sentencing Respondent on the escape conviction.

If there had been any doubt before, the case of *Williams v. New York*, 337 U.S. 241 (1949), established that this country's concept of individualized punishment allowed a sentencing judge "wide discretion in the sources and types of evidence used by him in determining the kind and extent of punishment to be imposed . . ." *Id.* at 247. Thus, without affording due process safeguards to the defendant, the sentencing judge can take into account information concerning the defendant's life, health, habits, conduct, and mental and moral propensities, including hearsay reports about the defendant's character and hearsay evidence of defendant's prior criminal activity which had not resulted in a charge or conviction. In the almost 30 years since *Williams*, courts have applied its holding to permit sentencing judges to consider such matters as arrests, pending indictments, dismissed charges, charges reversed on appeal, and charges resulting in acquittal (Petitioner's Brief 16).

The wide discretion which a sentencing judge possesses both as to the length of sentence and the factors which may be considered in arriving at that sentence have lead to the general proposition that sentences within statutory limits are normally unreviewable. *Gore v. United States*, 357 U.S. 386, 393 (1958). However, recent extensions of procedural rights and evidentiary restrictions to post adjudication proceedings[3] have lead several courts to

[3] *See, e.g.*, Mempa v. Rhay, 389 U.S. 128 (1967) (counsel must be afforded at sentencing even when sentence imposed at probation revocation hearing); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process requires preliminary and final parole revocation hearings); Gagnon v. Scarpelli, 411 U.S. 778 (1973), (due process requires preliminary and final probation revocation hearings).

develop exceptions to the general rule of non-reviewability. Where abuses are evident, either in the manner of sentencing or in the factors considered by a sentencing judge, courts are no longer reluctant to review and set aside such sentences on due process grounds. Thus, in *United States v. Tucker*, 404 U.S. 443 (1972), this Court remanded a case for resentencing where it appeared that the sentencing judge had considered defendant's convictions later determined unconstitutional because of the absence of counsel, even though the defendant confirmed the criminal activity underlying the convictions. In *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972), the court of appeals held that conclusions concerning a defendant's prior criminal activity, based upon unsubstantiated reports of an informer, were not of sufficient reliability to be properly considered by the sentencing judge. A variety of other abuses have also lead courts to vacate sentences or disapprove of the sentencing judge's practices on due process grounds.[4]

[4]United States v. Cavazos, 530 F. 2d 4 (5th Cir. 1976) (sentence vacated where a judge imposed maximum sentence on a narcotics dealer with no prior conviction on basis of FBI statistics that narcotics dealers often commit many crimes before initial apprehension); United States v. Dinapoli, 519 F. 2d 104 (6th Cir. 1975) (failure to secure presentence support constituted failure to properly exercise discretion); Woolsey v. United States, 478 F. 2d 139 (8th Cir. 1973) (en banc) (mechanical imposition of maximum sentence in conscientious objector case not within informed or sound discretion of trial judge); McGee v. United States, 462 F. 2d 243 (2d Cir. 1972) (when concurrent sentences imposed and conviction under one count later found unconstitutional, sentencing judge should reduce sentence on remaining counts or give summary explanation for failure to do so); Verdugo v. United States, 402 F. 2d 599 (9th Cir. 1968), *cert. denied*, 411 U.S. 984 (1973) (unconstitutionally obtained evidence may not be considered by sentencing judge).



Additionally, otherwise valid sentences or valid considerations by the sentencing judge have been held improper where the sentence or the factors considered conflict with or "chill" the exercise of a defendant's constitutional rights. Even though a defendant's contrition may be relevant to his need for rehabilitation, a sentencing judge may not impose an increased sentence because the defendant refuses to waive his 5th Amendment rights and admit his guilt after being convicted.[5] A majority of the circuit courts has also concluded that in arriving at the appropriate sentence a judge may not consider a defendant's not guilty plea since to do so would affect the right of every defendant to plead not guilty and have his guilt determined at trial.[6]

Against a historical backdrop of wide discretion on the part of the sentencing judge, and in light of the emerging doctrine that sentences will be more carefully reviewed for the purpose of discovering and delineating abuses of this discretion, must be viewed the several cases which have considered the issue presented by this case. In *Peterson v. United States*, 246 F. 118

[5]See, e.g., Poteet v. Fauver, 517 F. 2d 396 (3d Cir. 1975); Leblanc v. United States, 391 F. 2d 916 (1st Cir.); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).

[6]See, United States v. Derrick, 519 F. 2d 1 (6th Cir. 1975); Hess v. United States, 496 F. 2d 936 (8th Cir. 1974); United States v. Marzett, 485 F. 2d 207 (8th Cir. 1973), *cert. denied*, 415 U.S. 980; United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973); Baker v. United States, 412 F. 2d 1069 (5th Cir. 1969); Scott v. United States, 419 F. 2d 264 (D.C. Cir., 1969); United States v. Wiley, 278 F. 2d 500 (7th Cir. 1960). See also, Poteet v. Fauver, 517 F. 2d 393, 396 (3d Cir. 1975) (dicta).

(4th Cir. 1917), *cert. denied*, 246 U.S. 661 (1918), the court held that the sentencing judge, in imposing a three year sentence upon a postal employee convicted of stealing property worth forty cents, could properly take into account his belief that the defendant had suborned perjury of defense witnesses. Since that time, several other courts have held that a sentencing judge may consider his belief that the defendant committed or suborned perjury at his trial.[7] Although most of these cases are devoid of extensive analysis, the general reasons for these holdings have best been explained by Judge Frankel in *United States v. Hendrix*, 505 F.2d 1233, 1235-1237, (2d Cir. 1974). In that opinion, Judge Frankel rejected the contention that the defendant was being punished for perjury without a trial on that charge, and concentrated instead upon the practice and duty of the sentencing judge to evaluate the defendant's character with an eye towards determining his prospects for rehabilitation. After reviewing the many types of information which appellate courts have permitted sentencing judges to consider, Judge Frankel states:

> "Impressions about the individual being sentenced–the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society–are, for better or worse, central factors to be appraised under our theory of 'individualized sentencing.' The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia."



*Ibid.* at p. 1236. In confronting the contention that this practice may "chill" a defendant's desire to testify in his defense, Judge Frankel implies that another reason for permitting a sentencing judge to consider alleged perjury on the part of the defendant is to deter other defendants from committing perjury:

> "Without denying that the point has substance, we may say that it is not wholly evil to discourage defendants from taking the stand to lie."

*Ibid.* at p. 1236.

Other courts,[8] and commentators,[9] have expressed the opinion that the trial judge may not consider alleged perjury committed by a defendant in fixing an appropriate sentence. The underlying rationale for this position

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[7] United States v. Gamboa, 543 F. 2d 545, 547 (C.A. 5); United States v. Nunn, 525 F. 2d 958 (C.A. 5); United States v. Hendrix, 505 F. 2d 1233, (C.A. 2), *cert. denied*, 423 U.S. 897; Hess v. United States, 496 F. 2d 936, 939 (C.A. 8); United States v. Moore, 484 F. 2d 1284, 1287 (C.A. 4); United States v. Chuchette, 465 F. 2d 749, 754-755 (C.A. 9); United States v. Wallace, 418 F. 2d 876, 878 (C.A. 6), *cert. denied*, 397 U.S. 955; United States v. Levine, 372 F. 2d 70, 74 (C.A. 7), *cert. denied*, 388 U.S. 916; Humes v. United States, 186 F. 2d 875 (C.A. 10).

[8] In addition to the opinion below in this case, which relied upon Poteet v. Fauver, 517 F. 2d 393 (3d Cir. 1975), *see*, Scott v. United States, 419 F. 2d 264, 268-269 (D.C. Cir. 1969). See also, United States v. Moore, 484 F. 2d 1284, 1288-89 (4th Cir. 1973) (Craven, J., concurring).

[9] Note, *Discretionary Penalty Increases On the Basis of Suspected Perjury*, 1975 U. ILL. L.F. (1975); Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 211-217 (1956).

is that a judge may not summarily punish a defendant for perjury in the absence of the constitutional safeguards concerning charge and trial, perjury by a defendant at his own trial does not necessarily reflect upon his need for rehabilitation, the judge may be wrong in determining that perjury had been committed, and most important, that a defendant would be discouraged from exercising his right to testify if he is subject to additional punishment because the judge felt that he had committed perjury.

For the several reasons discussed *infra*, it is Respondent's position that the sentencing judge's consideration of a defendant's alleged perjury is materially different from other legitimate sentencing considerations, and because of the actual and potential abuse caused thereby, this Court should disapprove the consideration of alleged perjury in this case, either as a matter of constitutional law or in the exercise of the Court's supervisory power over the federal courts.

### A. The Commission of Perjury By a Defendant During His Trial Has No Legitimate Relationship To the Recognized Purposes of Sentencing.

As observed by the Government, a trial judge's discretion to consider various sentencing factors is at least limited to the extent that the matters considered must be reliably established and reasonably related to a recognized purpose of sentencing (Petitioner's Brief 15). The generally recognized purposes of sentencing include protection of society against the wrongdoer, punishment of



the wrongdoer, deterring the wrongdoer and others from committing similar offenses, and reformation and rehabilitation of the wrongdoer. *Williams v. New York*, 337 U.S. 241, 249, n. 13. It has been stated that there are two basis for permitting a sentencing judge to increase the sentence of a defendant believed to have committed perjury.[10] First, an additional increment of sentence may be considered punishment for the offense of perjury. Second, it may be contended that the commission of perjury reflects adversely upon the defendant's prospects for rehabilitation thereby justifying a lengthier sentence for the underlying conviction. There are two other possible basis–an increased sentence protects society from the perjurer, or deters other defendants from committing perjury. It is clear that if either punishment, protection, or deterrence underlie the increased sentence to the alleged perjurer, the defendant is in fact being incarcerated for the substantive crime of perjury which, as argued below, is improper. If the rehabilitation rationale is relied upon, then the practice is valid only if it can be shown that false testimony by a defendant at his trial is related to his prospects for rehabilitation.[11]

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[10] Scott v. United States, 419 F. 2d 264, 268-69 (D.C. Cir. 1969); Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE, L. J. 204, 212 (1956).

[11] While it is clear that the trial judge below increased Respondent's sentence because of alleged perjury, it is not clear whether the judge did so because of his belief that Respondent therefor needed additional incarceration for rehabilitation, or whether the judge was punishing Respondent for the perjury, protecting society, or attempting to deter other defendants from committing perjury.

1. The federal offense of perjury is a subtantive crime punishable by a fine of up to $2,000.00, or imprisonment of up to five years, or both. 18 U.S.C. Section 1621. Although in some situations an acquitted defendant may successfully raise the defense of res judicata or the doctrine of collateral estoppel in a subsequent perjury prosecution, a convicted defendant has no such defenses and is subject to prosecution for perjury. *United States v. Williams*, 341 U.S. 58 (1951). Of course, one charged with perjury would be accorded the full constitutional guarantees accorded all other criminal defendants, including, but not limited to, the right to be tried by an impartial jury and the right to acquittal unless proven guilty beyond a reasonable doubt.[12] If a court were to

[12] It would not be idle speculation to suggest that Respondent would not have been convicted of perjury on the evidence submitted at his escape trial. Perjury cases alone are subject to the so-called "two witness rule", discussed in more detail later in this brief, whereby the falsity of an allegedly perjured statement must be established by testimony of two independent witnesses or one witness together with corroborating circumstances. Weiler v. United States, 323 U.S. 606 (1945). Independent corroborating evidence must be such as to be inconsistent with the innocence of the Defendant. United States v. Weiner, 479 F. 2d 923 (2d Cir. 1973). Additionally, an essential element of the crime of perjury is that the alleged false statement be "material". In order to be material, the statement must have impeded and hampered the course of the trial in the sense that it had a tendency to affect the ultimate decision of the jury. United States v. Edwards, 443 F. 2d 1286 (8th Cir. 1971). The only witness who contradicted Respondent's testimony concerning duress was the inmate witness, Alex "Sarge" Barnes. Based upon the testimony of the two FBI officers, perhaps a jury would have been justified in determining that Respondent lied when he testified that he did not deny being Ted Grayson upon his arrest in New York City. However, *(continued)*



penalize a defendant for this substantive crime of perjury by increasing his sentence on another offense, or for that matter, if the court were to increase the defendant's sentence for the purpose of deterring other defendants from committing perjury, then one of the basic tenets of the criminal law would have been violated. The summary adjudication by a court of a defendant's guilt, and an increment of sentence imposed therefor, is certainly an inadequate substitute for the constitutional safeguards and other rights which a person charged with perjury would normally have.

It is little wonder, then, that proponents of the position supporting the right of a sentencing judge to consider alleged perjury reject any contention that an additional increment of sentence is punishment for the perjury, but rather maintain that the perjury is a reflection of the character of the defendant and his prospects for rehabilitation.[13] However, unlike other facts which a sentencing judge might consider, perjury of the defendant is a specific crime occurring in the presence of the judge. The temptation to punish the defendant, or to impose an additional sentence upon him for the purpose of deterring other would-be perjurers, is understandably

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this statement could hardly be considered as having any appreciable effect upon the ultimate decision of the jury. On the other hand, there was sufficient evidence to have convicted witness Barnes of perjury since two independent witnesses, Respondent and the other inmate witness, contradicted his denials of threatening or otherwise confronting Respondent.

[13] United States v. Nunn, *supra*, 525 F. 2d at 560-61; United States v. Hendrix, *supra*, 505 F. 2d at 1235-36; United States v. Levine, *supra*, 372 F. 2d at 74; Judge Rosenn's dissent (Pet. App. 22a).

great. As pointed out earlier in this brief, the opinion in *United States v. Hendrix, supra*, suggests that one of the benefits gained from permitting the disputed practice is that it would deter other defendants from committing perjury in their defense. The line between punishment for the substantive offense of perjury and increased punishment on the underlying offense as a result of the perjurious defendant's need for additional rehabilitation, is an obscure one, and may not be present at all.

2. The position that a sentencing judge may consider alleged perjury by a defendant to the extent that it is reflective of his character and need for rehabilitation, is premised upon the conclusion that the commission of perjury by a defendant at his own trial demonstrates a greater need for rehabilitation. However, the validity of that conclusion is open to question. As stated by the court in *Scott v. United States, supra*, 419 F.2d at 269:

> ". . . the peculiar pressures placed upon a Defendant threatened with jail and the stigma of conviction make his willingness to deny the crime an unpromising test of his prospects for rehabilitation guilty. It is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man may quite sincerely repent his crime but yet, driven by the urge to remain free, may protest his innocence in a court of law. This realization, indeed, unquestionably accounts for the extreme infrequency with which convicted criminals are in fact prosecuted for perjury committed at their trials."

Long held notions concerning the predictive effect of a defendant's actions in the course of judicial proceedings



on the rehabilitative prospects of the defendant are subject to serious dispute in light of modern day criminal practice and procedure. For example, the American Bar Association, *Standards Relating to Pleas of Guilty*, Section 1.8(a)(ii) (Approved Draft 1968), sanctions sentence concessions to defendants who enter a plea of guilty because "the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct."[14] However, the widespread and perhaps necessary practice of plea bargaining has radically altered the criminal justice model as known in less hectic times. Few defendants have the opportunity to participate in the plea bargaining system and this, coupled with the almost universal knowledge that a defendant who bargains for his plea will usually receive a lighter sentence, negates the self-determination value previously ascribed to guilty pleas.[15] Rather than demonstrating repentance

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[14] A survey of federal judges conducted in the mid 1950's indicates that a majority of the 140 judges who cooperated with the survey feel that a defendant's guilty plea is a relevant factor in the sentencing procedure and that a defendant pleading guilty normally receives a more lenient punishment than a defendant who pleads not guilty.

> "The predominant basis for a court's considering a defendant pleading guilty less culpable than one denying guilt is the belief that a guilty plea demonstrates the readiness of the accused to accept responsibility for his criminal acts. Judges feel that such a confession of wrongdoing evinces a repentant attitude, and thus represents an important step toward rehabilitation of the accused."

Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE, L. J. 204, 205-06 (1956).

[15] See generally, Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 Harv. L. Rev. 564 (1977).

and a willingness to assume responsibility for his actions, it is far more likely that a defendant pleading guilty does so out of expediency and a desire to avoid a harsher penalty.

Similarly, a defendant who elects to plead not guilty and exercise his right not to testify, probably does so not because of scruples against perjury, but because he feels his best chance of acquittal is a failure of proof beyond a reasonable doubt rather than risking the jury's disbelief and sure conviction. When a defendant avoids perjury out of expediency rather than principle, it is doubtful whether he is a better prospect for rehabilitation than the defendant who perjures himself in an unsuccessful effort to obtain acquittal. The action of a defendant subjected to the pressures of a criminal charge and judicial proceedings is not an accurate gauge for determining his prospects for rehabilitation.

**B. Alleged Perjury By a Defendant and the Determination of Its Existence, is Inherently Different From Other Sentencing Considerations.**

*Williams v. New York, supra*, and its progeny, establish that under our theory of individualized sentencing a judge may consider, without the burden of due process requirements, various character traits in selecting the appropriate sentence for a convicted defendant. These character traits include prior criminal activity in the form of prior convictions or prior criminal conduct not resulting in conviction, as well as non-criminal status or behavior such as general character, age, health, family



situation, past life and habits (Petitioner's Brief at 16–17). Even if we were to assume that the commission of perjury by a defendant at his trial is relevant to an evaluation of his prospects of rehabilitation, such perjury, being a distinct crime presumably committed shortly before sentencing, is properly punishable in a separate criminal proceeding. Thus, perjury as a sentencing factor is significantly different from the other sentencing factors. The defendant may have a history of irresponsible behavior or other undesirable character attributes which, though not subject to separate criminal proceedings, are nevertheless relevant in selecting an appropriate sentence. Similarly, past criminal conduct as it reflects upon the present character of a defendant is subject to no alternative legal sanctions either because such conduct has already been the subject of a criminal proceeding or because the passage of time renders criminal proceedings thereon impractical or illegal. Because perjury as a sentencing factor is practically the only sentencing factor[16] for which alternative legal

[16] It may be argued that heretofore valid sentencing factors such as pending indictments and recent uncharged criminal acts may also be subject to separate criminal proceedings and that the propositions set forth herein cannot stand without disapproving the decisions which sanction the consideration of this type of criminal conduct. However, there is another and perhaps more important distinction between perjury and *all* other sentencing criteria which is not discussed here because it is the subject of the next section of this brief. That is, only the consideration of perjury in the determination of an appropriate sentence acts to "chill" the right of defendants to testify in their own trial. While this Court may not find that the sentencing judge's consideration of alleged perjury chills a defendant's right to testify to an unconstitutional extent, it can hardly be denied that some chilling effect exists. Thus, a court may consider sentencing factors such as

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sanctions are available, judges should determine any additional time necessary for rehabilitation in separate proceedings which provide recognized procedural safeguards to the accused.

There is another significant difference between perjury and other sentencing factors related to a defendant's need for rehabilitation. Perjury is the only such factor the existence of which is determined by the trial judge. In the ordinary sentencing proceedings, a judge considers a variety of facts concerning prior criminal conduct and general character attributes the existence of which have been determined by probation agents specifically trained to gather the necessary information and prepare presentence reports. Fed. R. Crim. P. 32(c)(2). From this information, the judge may consider a number of imprecise factors in an effort to determine a defendant's character and concomitant rehabilitative needs. However, the existence of perjury by the defendant is based upon an

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untried indictments and recent uncharged criminal acts despite the existence of alternative criminal proceedings because the consideration of these factors have no affect upon the rights of the defendant at the instant trial. The same cannot be said for consideration of alleged perjury in determining an appropriate sentence.



isolated factual determination[17] by the judge. Because the pressures of a trial may require the judge to compare the defendant's testimony with that of cunning witnesses who concoct credible fabrications, there is a danger in permitting the judge to rely on his personal impressions. In simple terms, a judge should not impose additional punishment because of his belief that the defendant lied in his own defense since the judge may very well be wrong. See, *United States v. Moore*, 484 F.2d 1284, 1288 (4th Cir. 1973) (Craven, J. concurring).

Perjury is particularly difficult to determine and thus is subject to the so-called "two witness rule" which requires false testimony to be proven by two independent witnesses, or by one witness and corroborative evidence.

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[17] To this extent, the situation is similar to that in Specht v. Patterson, 386 U.S. 605 (1967) where this Court refused to permit judicial consideration of a potential sentencing factor. The case involved a state sex offender statute permitting the trial court to give a defendant convicted of a sex-related crime an indeterminate sentence from one day to life if the judge found that the defendant was a threat to members of the public or an habitual offender and mentally ill. The court declined to apply the principles of Williams v. New York, *supra*, to this situation and required that the necessary findings be accompanied by due process safeguards. While the holding in this case appears to have been grounded upon the fact that the state sex offender statute did not make the commission of the specified crime the basis for sentencing, also important was the fact that the necessary findings under the statute were new and separate findings not related to the offense charged. To the extent that *Specht* requires due process safeguards where a distinct and separate issue is involved, the argument may be made that a determination that a defendant committed perjury at trial is such a distinct and separate issue requiring due process safeguards not presently conferred in the federal sentencing procedure.

The "two witness rule" is firmly established as part of the federal law on perjury. *Weiler v. United States*, 323 U.S. 606 (1945). The necessity for this rule may come from the belief that an honest witness needs protection from "hasty and spiteful retaliation in the form of unfounded perjury prosecutions," or from the belief that equally honest witnesses may well have differing recollections of the same event and therefore, perjury ought not to rest entirely upon an oath against an oath. *Ibid.* at 550. Since the special proof requirements for perjury are based upon the inherent danger of permitting a finding of perjury in the absence of these requirements, it is unreasonable to permit a sentencing judge to consider his belief that the defendant committed perjury where that belief is unlikely to be based upon impressions or suppositions only.

It has been argued above that among various factors which might be considered in determining an appropriate sentence, only perjury of the defendant is subject to alternative criminal procedures and sanctions, and that perjury is a difficult crime to prove yet it is the only sentencing factor which must be established by the judge. Because of these propositions, Respondent asks this Court to prohibit sentencing judges from summarily increasing the would-be sentence of a defendant suspected of committing perjury, whether that increase is based upon the need for punishment or the need for greater rehabilitation. Probably because of these two propositions, the power of a judge to impose summary punishment for perjury has been restricted in another situation. Lying under oath in a judicial proceeding may at times be punishable as criminal contempt.[18] It would

[18] Note, *Falsification as Contempt*, 7 VAND. L. REV. 272 (1954).



appear that an intentional lie as to a material fact would be an obstruction of justice. However, it has been held that perjury alone is not punishable by summary contempt proceedings. *In re Oliver*, 333 U.S. 257 (1948).

> "If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing . . ."

*Ibid.* at 509. The rigid requirements set for perjury to qualify as criminal contempt reflect the policy that punishment for perjury should rarely be imposed in the absence of normal due process safeguards. If a sentencing judge increases a defendant's sentence because of alleged perjury at trial, the judge is doing indirectly what he cannot do directly, and in the process, is depriving a defendant of his right to appeal.[19]

Appellate courts have always been concerned with the veracity of facts considered by a judge in the sentencing process.[20] The substantial difficulty of accurately determining the existence of perjury in a trial where perjury has not been charged, particularly since alternate criminal procedures are available, distinguishes this factor from other legitimate sentencing factors and militates against its use in cases such as the one at bar.

[19] See Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 213-215 (1956).

[20] United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948); United States v. Weston, 448 F. 2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 106 (1972).

### C. The Threat of An Increased Sentence Based Upon the Trial Judge's Belief that the Defendant Committed Perjury During His Trial, Unconstitutionally "Chills" the Exercise of the Defendant's Right to Testify in His Own Behalf.

It is clear that a defendant in a federal criminal proceeding has a statutory right to testify in his own behalf,[21] and perhaps a constitutional right to do so.[22] To permit a sentencing judge to summarily increase a convicted defendant's sentence because of the belief that the defendant committed perjury would needlessly discourage many defendants from testifying in their own behalf at trial. As stated by Judge Craven of the 4th Circuit Court of Appeals:

> "I am very strongly of the opinion that a trial judge may not properly impose a harsher sentence upon a defendant because he thinks the defendant lied on the witness stand. Such a practice will inevitably chill and hamper, if not ultimately destroy, the right to testify in one's own defense. It seems to me unconscionable that a defendant must run the risk of conviction of the offense charge and at the same time run the gauntlet of disbelief."[23]

Not infrequently, courts are requested to review a situation where it is contended that a particular aspect

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[21] 18 U.S.C. Section 3481.

[22] *See*, Brooks v. Tennessee, 406 U.S. 605, 612 (1972); United States ex rel. Wilcox v. Johnson, 555 F. 2d 115 (3d Cir. 1977).

[23] United States v. Moore, *supra*, 384 F. 2d at 1288. See also Scott v. United States, *supra*, at 269.



of the criminal process "chills" the exercise of some constitutional or statutory right of the defendant, or where that aspect of the criminal process requires the defendant to choose between two or more rights. The varying circumstances of each case have lead to varying rules.[24] While counsel admits to some confusion as to whether in fact there is a particular "rule" covering Respondent's contention on this issue, it would appear that determinations are in fact made on a case-by-case basis.[25] A review of the recent cases would indicate that the legitimacy of and policy behind the particular aspect of the criminal process complained of must be weighed against the extent to which the complained of practice actually chills the particular right of the defendant. The ultimate issue is whether the complained of practice places an impermissible burden on the right of the defendant, or whether the practice merely requires the making of a difficult choice which is an inherent part of our legal system.[26]

The reasons behind and the legitimacy of permitting the sentencing judge to consider his belief that the defendant lied at trial has previously been discussed in this

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[24] *Compare, e.g.*, United States v. Jackson, 390 U.S. 570 (1968), (practice complained of needlessly encouraged waivers of constitutional rights) *with* Parker v. North Carolina, 397 U.S. 700 (1970) (defendant voluntarily waived rights), *and* Crampton v. Ohio, 402 U.S. 183, 217 (1971) (compelling election does not impair to an appreciable extent any of the policies behind the rights involved).

[25] Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973).

[26] See, Crampton v. Ohio, *supra*, 402 U.S. at 213; Chaffin v. Stynchcombe, *supra*, 412 U.S. at 32-35.

brief. Respondent reasserts that there is substantial doubt as to whether the practice has relevance to any legitimate sentencing goal and even if such relevance is found, it is doubtful whether a sentencing judge should be permitted to summarily determine that a defendant committed perjury in light of the fact that it is extremely difficult to determine accurately the existence of perjury and in light of the fact that alternative criminal procedures are readily available. Because of the doubtful validity of the practice in the first place, it is submitted that very little in the way of "chilling effect" need be demonstrated in order to conclude that the practice here in issue places an impermissible burden on the right of a defendant to testify in his own behalf.

If fact, the burden is a substantial one. Petitioner argues that it is unlikely that a defendant would forego presenting truthful testimony because of the risk of receiving an increased sentence. However, there are strong indications that sentence enhancement for alleged perjury is a common practice. The number of cases on this point decided by federal circuit courts of appeal probably represent only a fraction of the instances where the sentencing judge stated his reasons for the sentence enhancement, or where the record otherwise indicated the probable reasons. One survey of federal trial judges revealed that over 20% of the judges responding to the survey relied upon suspected perjury as a basis for more severe punishment of a defendant convicted at trial, some of those judges apparently presuming the occurrence of perjury from the mere fact of conviction.[27]

[27] Note, *The Influence of Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 211-212 (1956).



This widespread practice, if known, would naturally cause a truthful defendant to at least consider the possible consequences of his taking the stand. And where the defense or testimony is in the slightest manner unusual, or where the testimony will be contradicted by testimony of apparently more credible prosecution witnesses, a decision to avoid the risk by not testifying would be a sound and practical one. Nor is the choice merely between testifying and not testifying. The plea bargaining system widely employed in this country, by itself, tends to encourage innocent defendants to plead guilty in order to receive a less severe sentence.[28] An innocent defendant who is considering whether to go to trial or negotiate a plea would in all probability choose the later alternative if he concludes that his defense or testimony will be open to question and that he therefore, risks the judge's disbelief and even greater sentence.

The choice required to be made by a defendant as a result of the practice here in issue is not just another difficult judgment routinely faced by criminal defendants and their attorneys. *Crampton v. Ohio*, 402 U.S.183, 215 (1971). Petitioner compares the risk of an enhanced sentence because of alleged perjury with other risks faced by a defendant who chooses to testify, such as the possibility of a perjury prosecution, searching cross-examination, or impeachment with prior convictions. (Petitioners Brief 26-27). However, these are substantially different risks. Searching cross-examination and impeachment by prior convictions is an inherent part of the fact finding basis of jury trials. The risks go only

[28] See, Note, *The Influence of Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 211-212 (1956).

to whether or not the defendant will be found guilty by the jury. On the other hand, when the defendant is subjected to an increased sentence because the judge believed he lied, the defendant's choice becomes substantially more difficult. The risk involved has nothing to do with the determination of guilt by twelve jurors, but rather goes to the severity of the sentence which he will receive if convicted. An innocent defendant should not have to make this choice. The risk of a perjury prosecution is not nearly as worrisome because at least the defendant would be afforded due process in defending himself, quite different from the risk of summary punishment by a single judge who happens to disbelieve him.

Perhaps the case most closely analogous to the one at bar is *Brooks v. Tennessee*, 406 U.S. 605 (1972). That case involved the constitutionality of a Tennessee statute which required a criminal defendant desirous of testifying to do so before any other testimony for the defense was presented. The court held that this statute impermissibly burdened a defendant's right to remain silent, and inferentially, to take the stand, because the defendant was required to make his choice before he had a chance to evaluate the strength of his defense. The Tennessee statute had an admittedly legitimate purpose of discouraging testimonial influence by decreasing the risk that a defendant would color his testimony to conform with other testimony presented in his defense. But the possibility of a defendant committing perjury was held not to outweigh the defendant's unrestricted right of choosing whether and when to testify. It is submitted that the legitimacy of and purpose behind the Tennessee statute are more obvious than are the legitimacy and purpose of permitting a sentencing judge to consider his



belief that a defendant lied at trial. Furthermore, the chilling effect of the statute upon a defendant's right to remain silent or testify was certainly no greater than the chilling effect upon a defendant's right to testify caused by the practice here in issue. Nevertheless, the choice which the statute compelled a defendant to make was apparently not one of those routinely difficult judgments inherent in the criminal process as had been found in the earlier case of *Crampton v. Ohio, supra*. The conclusion that an impermissible chilling effect is created when a judge is permitted to enhance a sentence because of suspected perjury is more compelling than the situation presented in *Brooks v. Tennessee*.

### D. If This Court Should Conclude That It Is Not Constitutionally Impermissible For a Sentencing Judge To Consider His Belief That a Defendant Lied at Trial, Then in the Exercise of the Court's Supervisory Power it Should Prohibit or Otherwise Restrict This Practice in Federal Criminal Cases.

In discussing various aspects of the issue in this case, the factual background of the case may have been forgotten or stressed too little. Despite the trial judge's belief that his defense was a "complete fabrication", Respondent strenuously denies that he committed perjury in testifying at his trial. A reading of the trial transcript will indicate that this is not a case of obvious false testimony, and at best, the trial judge's belief was a matter of opinion. Furthermore, in light of the court's charge to the jury, it is evident that the Respondent's testimony was not necessarily inconsistent with

the finding of guilt since the jury could have determined that Respondent should have sought the protective custody of the officials at the Allenwood Prison Camp or that he should have turned himself in immediately upon leaving the Camp.

Respondent's arguments thus far presented have been directed towards the unconstitutionality of the sentence imposed upon him. However, in order to affirm the decision of the court below, it is not necessary to conclude that the trial judge's consideration of perjury as a sentencing factor was unconstitutional. Ever since *McNabb v. United States*, 318 U.S. 322 (1943), it has been recognized that in exercising its supervisory power over federal courts, this Court is not bound by the minimal historic safeguards set forth in the Constitution. Rather, the court's supervisory power has been used to effect significant reforms in the federal judicial practice which were not mandated by the Constitution. In addition to formulating rules of general applicability to federal courts,[29] the Court has exercised its supervisory powers to do justice in a particular fact situation.[30]

Since reasonable men may disagree, particuarly on constitutional issues, it is recognized that the Court may not concur with Respondent's position that the practice here in issue was unconstitutional. However, regardless of constitutionality, it is submitted that the points heretofore raised indicate that the desirability of permitting

[29] See, e.g., Jencks v. United States, 353 U.S. 657 (1957); Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956).

[30] Marshall v. United States, 360 U.S. 310 (1959); Grunewald v. United States, 353 U.S. 391 (1957).



federal judges to increase sentences because of a defendant's alleged perjury is very doubtful. Therefore, Respondent requests the Court to exercise its supervisory powers and prohibit this practice in federal criminal trials.

Alternatively, Respondent requests the Court to exercise its supervisory powers and establish safeguards which would adequately prevent the abuses demonstrated by the facts of this case. Several courts and judges rendering decisions contrary to the position of Respondent here, have nevertheless suggested some controls. For example, in *United States v. Moore, supra*, 484 F.2d at 1288, the majority opinion states:

> It is better in the usual case for the trial judge who suspects perjury to request an investigation. Then, if the facts warrant it, the United States Attorney may institute prosecution for this separate and distinct crime."

In *United States v. Hendrix, supra*, 505 F.2d at 1236-37, the Second Circuit Court of Appeals held that perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it. The court also noted that:

> "This was a case where the jury could not have convicted without being persuaded beyond a reasonable doubt that the appellant had lied, deliberately and willfully. The trial judge concurred in that unanimous persuasion."

Judge Rosenn, dissenting in the court below, would limit a judge's discretion to consider alleged perjury to situations where the judge was convinced beyond a reasonable doubt that the defendant intentionally lied on material

issues of fact and where the falsity of the defendant's testimony is necessarily established by the finding of guilt. (Pet. App. 30a-31a).

It is suggested that Judge Rosenn's proposed safeguards are the minimum which should be established in an attempt to alleviate the many problems connected with using suspected perjury as a sentencing factor. As pointed out earlier in this Brief, one of the chief problems with the practice is that the judge can summarily conclude that a defendant has committed perjury. Therefore, any safeguards adopted by this Court should include a prohibition against considering perjury as a sentencing factor unless the falsity of the defendant's testimony is necessarily established by the finding of guilt. At least under these circumstances, the finding of false testimony would be based upon the conclusions of twelve individuals rather than upon the conclusions of the judge alone. Since, in the case at bar Respondent's testimony was not inconsistent with the guilty verdict, the case should be remanded for resentencing without consideration of the alleged perjury.

## CONCLUSION

The judgment of the court of appeals should be affirmed and the case should be remanded to the district court for resentencing without consideration of Respondent's alleged false testimony given at trial.

Respectfully submitted,

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